

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff

V.

ANTHONY JORDAN,

Defendant

Case No.: 2:13-cr-00221-APG

**ORDER DENYING IN PART MOTION  
TO VACATE AND SETTING HEARING**

[ECF No. 258]

Defendant Anthony Jordan was convicted of seven counts of aiding and abetting bank robbery in violation of 18 U.S.C. § 2113(a) and § 2, three counts of aiding and abetting the use (or brandishing) of a firearm in a crime of violence in violation of 18 U.S.C. § 924(c) and § 2, and three counts of interference with commerce by robbery (Hobbs Act robbery) in violation of 18 U.S.C. § 1951(a). He now moves to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. ECF No. 258. He argues that he received ineffective assistance of counsel and that the prosecutor abused its discretion by charging him with three counts of violating § 924(c). The United States opposes the motion. ECF No. 264.

I dismiss Jordan's claim that the prosecutor abused its discretion, as he has defaulted on that claim and is otherwise barred from relitigating the claim. I will conduct a hearing on Jordan's claim that his counsel was ineffective by incorrectly advising him regarding the elements of aiding and abetting a § 924(c) offense. But I dismiss his remaining claims that his counsel was ineffective as those claims are without merit and rebutted by the record.

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## Background

Jordan and two others robbed seven banks and three retail stores in late 2012 through early 2013. Marquee Munerlyn, typically carrying a gun, would rob the establishments.<sup>1</sup> Jordan acted as the lookout. After Munerlyn was arrested, he acknowledged his participation in the crimes, implicated Jordan, and pleaded guilty. He also agreed to assist the government, including testifying at Jordan's trial.

Jordan elected to go to trial. As relevant to his motion, the following events occurred during his trial. After the jury was selected, but before opening arguments, Juror Four indicated to the court that he had an issue regarding his ability to serve. The juror was canvassed outside the presence of the other jurors and counsel had an opportunity to conduct additional voir dire. In response to my and defense counsel's questions,<sup>2</sup> the juror indicated his issues and stated he could not be fair and impartial. He further indicated that he had not discussed his issues with the other jurors. I excused the juror for cause.

On the second day of trial, Juror Thirteen indicated that the trial testimony had refreshed her memory regarding a question asked during voir dire.<sup>3</sup> She was canvassed outside the presence of the other jurors and counsel had an opportunity to also ask questions. Juror Thirteen stated that her son had been a victim of bank robbery 14 years prior to the trial. She stated she had not shared this with the other jurors and stated that it would not affect her ability to be fair

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<sup>1</sup> Munerlyn self-identified his role in the crimes as "the gunman, you know, the main one that committed all the robberies."

<sup>2</sup> The prosecutor elected to not ask any questions.

<sup>3</sup> Juror Thirteen had disclosed, during voir dire, that her sons had previously worked for a bank.

and impartial. Based on the statements the juror provided, I determined that she should not be removed for cause.

Following the government's case-in-chief, I questioned Jordan about his right to testify. I asked him, "have you had sufficient time to consult with your attorney about your decision whether to testify or not?" He responded that he would "like a little more time." I inquired as to how much time he needed. Defense counsel suggested 10 minutes would be sufficient. Ultimately, the proceedings were recessed for 30 minutes to allow Jordan to talk with his counsel. Immediately following the recess, I asked Jordan whether he had sufficient time to talk to his attorney. Jordan stated he had. I continued questioning Jordan, asking him whether "your attorney fully informed you about the consequences of your decision to testify or to not testify?" He responded, "Yes." I asked whether counsel had answered all questions Jordan had asked. He responded, "Yes." I finished by asking Jordan whether he had any further questions he wanted to discuss with his counsel before indicating his decision whether to testify or not. He responded, "No." Following this, Jordan stated he would not testify.

During closing arguments, while arguing whether the government had met its burden of proof regarding the § 924(c) offenses, Jordan’s lawyer stated: “[H]e can’t be convicted [of aiding and abetting a § 924(c) offense] unless he performed an act to facilitate or encourage the use of the gun, not the robbery itself, the use of the gun.”

## Analysis

Jordan contends that the government abused its discretion by charging him with three counts of aiding and abetting a § 924(c) offense. He also contends that his counsel provided ineffective assistance:

- a) by failing to advise him to accept a plea agreement;

- b) for incorrectly advising him regarding the elements of aiding and abetting a § 924(c) offense (which advice was consistent with the above-noted statement made in closing arguments);
- c) for failing to support his decision to testify at trial;
- d) for insufficiently attempting to rehabilitate Juror Four or, alternatively for failing to establish that Juror Four had tainted the jury;
- e) for insufficiently arguing that Juror Thirteen be excused for cause.

### **Prosecutorial Abuse of Discretion**

Jordan concedes that the decision of what charge to file generally rests entirely in the prosecutor's discretion. But, he argues, "this one seems to have gone too far." In opposition, the United States argues that Jordan has procedurally defaulted on the claim. Jordan responds both that he did not default (because he litigated the claim in his direct appeal) and that he can show cause for his default. As neither of Jordan's arguments is meritorious, I cannot reach the merits of his claim.

Jordan's argument, that he "in essence *did* directly appeal the prosecutor's charging decision" (emphasis original), amounts to a concession requiring me to dismiss this claim. "When a defendant has raised a claim and has been given a full and fair opportunity to litigate it on direct appeal, that claim may not be used as basis for a subsequent § 2255 petition." *United States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir. 2000) (citation omitted); *see also Olney v. United States*, 433 F.2d 161, 162 (9th Cir. 1970) ("Having raised this point unsuccessfully on direct appeal, appellant cannot now seek to relitigate it as part of a petition under § 2255."). Given Jordan's concession that "[a]ll [he] is doing now is re-stating the same" argument, and given that the Ninth Circuit rejected that argument, he cannot re-litigate the claim in the present motion.

1 Further, if Jordan did not litigate this claim in his direct appeal, he has procedurally  
2 defaulted the claim. A defendant procedurally defaults on a claim that he could have raised in  
3 his direct appeal but did not. *Massaro v. United States*, 538 U.S. 500, 504 (2003) (“[C]laims not  
4 raised on direct appeal may not be raised on collateral review unless the petitioner shows cause  
5 and prejudice.”).

6 Jordan contends that he “he can claim ‘novelty’ for his failure to raise the overcharging  
7 of his indictment on direct appeal.” A defendant has cause to excuse a default where “a  
8 constitutional claim is so novel that its legal basis is not reasonably available to counsel.” *Reed v.*  
9 *Ross*, 468 U.S. 1, 16 (1984); *see also, United States v. Braswell*, 501 F.3d 1147, 1150 (9th Cir.  
10 2007) (identifying “novelty” as a claim that “rests upon a new legal or factual basis that was  
11 unavailable at the time of direct appeal”). Jordan has not identified any new legal or factual  
12 basis unavailable to him at the time of his direct appeal.<sup>4</sup> Thus, he has not shown cause to  
13 excuse his procedural default. Accordingly, I must dismiss this claim as defaulted.

#### 14 **Ineffective Assistance of Counsel**

15 To prevail on a claim of ineffective assistance of counsel under 28 U.S.C. § 2255, Jordan  
16 must demonstrate: (1) that counsel’s representation fell below an objective standard of  
17 reasonableness (the “deficiency” prong); and (2) that counsel’s deficient performance prejudiced  
18 him (the “prejudice” prong). *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The  
19 movant must make a compelling evidentiary showing in order to satisfy the deficiency prong:

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21 <sup>4</sup> Jordan argues his present claim is novel by referencing questions asked by one of the  
22 appellate judges during oral argument. He has not shown, however, why questions of an  
23 appellate judge constitute a new legal basis supporting a claim of prosecutorial misconduct.  
Neither do such questions amount to facts supporting a claim that the prosecutor abused its  
discretion in charging Jordan.

1 To establish deficient performance, a person challenging a  
2 conviction must show that counsel's representation fell below an  
3 objective standard of reasonableness. A court considering a claim  
4 of ineffective assistance must apply a strong presumption that  
counsel's representation was within the wide range of reasonable  
professional assistance.

5 *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (internal citations and quotations omitted). I  
6 review an ineffectiveness claim against the backdrop of the "strong presumption that counsel's  
7 representation was within the wide range of reasonable professional assistance." *Stokley v. Ryan*,  
8 659 F.3d 802, 811-12 (9th Cir. 2011). There is no constitutional deficiency where counsel fails  
9 "to raise a meritless legal argument," *Shah v. United States*, 87 F.3d 1156, 1162 (9th Cir. 1989),  
10 or where a "movant's allegations, viewed against the record," are "palpably incredible or  
11 patently frivolous." *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989). "Deficiency,"  
12 therefore, requires the movant "to show that counsel made errors so serious that counsel was not  
13 functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Harrington*, 131  
14 S. Ct. at 787.

15 The prejudice prong is just as strict. The movant must demonstrate a "reasonable  
16 probability that, but for counsel's deficiency, the result of the proceeding would have been  
17 different." *Strickland*, 466 U.S. at 694 ("reasonable probability" is "sufficient to undermine  
18 confidence in the outcome"); *see also Wong v. Belmontes*, 130 S. Ct. 383, 390-391 (2009)  
19 (burden on claimant) (quoting *Strickland*, 466 U.S. at 694); *United States v. Palomba*, 31 F.3d  
20 1456, 1461 (9th Cir. 1994) (in addition to defective performance, movant "must also meet the  
21 substantial burden" of establishing prejudice). The movant thus does not prove prejudice by  
22 (1) listing the things he thinks his attorney "should have done," and then (2) speculating that, had  
23 he done them, there might have been a different outcome. Rather, the movant must state the

1 specific facts that—but for counsel’s deficient performance—would have likely produced a more  
2 favorable result. *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994) (“Conclusory allegations which  
3 are not supported by a statement of specific facts do not warrant habeas relief.”) (citation  
4 omitted); *see also Gonzalez v. Knowles*, 515 F.3d 1006, 1015-16 (9th Cir. 2008) (“Gonzalez does  
5 not contend that he actually suffered from a mental illness; he merely argues that *if* tests had  
6 been done, and *if* they had shown evidence of some brain damage or trauma, it *might have*  
7 resulted in a lower sentence. Such speculation is plainly insufficient to establish prejudice.”)  
8 (emphases in original) (citation omitted).

9 Jordan has failed to establish that his counsel provided ineffective assistance regarding  
10 Jordan’s decision to not testify. He asserts that he wanted to testify, but that his counsel “did not  
11 verify with his client that he wanted to testify in his own behalf during colloquy with the court  
12 about whether or not Jordan would take the stand in his own behalf.” I note, initially, that Jordan  
13 cannot obtain relief on the basis that he was denied his right to testify.

14 In [*United States v. Edwards*, 897 F.2d 445 (9th Cir.), cert. denied, 498 U.S. 1000,  
15 111 S.Ct. 560, 112 L.Ed.2d 567 (1990),] the defendant wanted to testify, but the  
16 lawyer misunderstood him and did not call him as a witness. *Id.* at 446. We held  
17 the court has no duty to advise the defendant of his right to testify, nor is the court  
required to ensure that an on-the-record waiver has occurred. *Id.* When a  
defendant is silent in the face of his attorney’s decision not to call him as a  
witness, he has waived his right to testify. *Id.* at 447.

18 *United States v. Nohara*, 3 F.3d 1239, 1243-44 (9th Cir. 1993).

19 Jordan did not waive his right to testify by merely remaining “silent in the face of his  
20 attorney’s decision not to call him as a witness.” Rather, he expressly waived his right to testify  
21 following my questioning to ensure the waiver was knowing and voluntary. Jordan indicated  
22 that he wanted more time to discuss the decision with his attorney. While counsel suggested 10  
23 minutes would be sufficient, the proceedings were recessed for 30 minutes to allow them to

1 discuss the issue. Following that recess, Jordan affirmed that he had sufficient time to confer  
2 with his attorney.

3 Jordan now argues that his express waiver of his right to testify was neither knowing nor  
4 voluntary because “he could not feel comfortable testifying.” He attributes this discomfort to his  
5 counsel’s ineffective assistance in preparing him to testify. The right to effective counsel,  
6 however, permits counsel to make strategic defense decisions, including evaluating whether or  
7 not a defendant should testify. *See Burger v. Kemp*, 483 U.S. 776, 792 (1987). An attorney’s  
8 assistance is not ineffective merely because the defendant disagrees with his attorney’s  
9 assessment that the defendant would harm, rather than help, his defense by testifying.

10 Jordan’s argument amounts to a post-hoc, speculative disagreement regarding a strategic  
11 decision whether his testimony would help or hurt his defense. He asserts that “his testimony  
12 could be the only way that he could negate the element of knowing in advance that Munerlyn  
13 would carry a firearm in the specific robberies in which they were charged.” As his defense  
14 counsel states, however, he “counseled [Jordan] if he testified truthfully, he would convict  
15 himself.” Jordan has not met his burden of showing that his counsel’s advice that Jordan would  
16 convict himself if he testified objectively fell outside the wide range of reasonable professional  
17 assistance.

18 Jordan has also failed to show his counsel was ineffective regarding Juror Four, whom I  
19 excused for cause. The record establishes (and Jordan does not argue otherwise) that Juror Four  
20 stated he could not be a fair and impartial juror.<sup>5</sup> Jordan argues his counsel was ineffective for a

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21 <sup>5</sup> Juror Four: I’m reading a book for my criminal justice class, it’s called “The New Jim  
22 Crow.” It’s talking about, like, sending young black men to jail and I think I would have  
23 a conflict with that. I don’t think I can be completely unbiased in that situation.

1 wide, and sometimes conflicting, range of reasons. He contends counsel was ineffective for  
2 failing to rehabilitate Juror Four. Jordan fails to offers any suggestion, argument, or evidence  
3 showing how effective counsel would or could have rehabilitated a juror who, as Jordan  
4 concedes, “expressed a strong and previously unmentioned bias.” Jordan argues his counsel was  
5 ineffective for failing to verify that Juror Four had not affected other jurors. He ignores,  
6 however, that I engaged in a colloquy<sup>6</sup> with Juror Four establishing that he had not discussed his  
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8 Court: And why is that? What is it about the book? I'm not familiar with the book, I  
9 mean, I know the concept, but . . . .

10 Juror Four: It's just talking about how, like, the criminal justice system targets black  
11 African-American males and I wouldn't be completely unbiased. And plus, like,  
12 my dad, he went through a lot of police harassment, so, that's another thing where  
13 I wouldn't be completely unbiased.

12 Court: Okay. You think it would affect your ability to be a fair and impartial juror on  
13 this case?

14 Juror Four: To be honest, yes, sir.

15 <sup>6</sup> I engaged in the following exchange with Juror Four:

16 Court: Have you shared any of these opinions or issues with any of the other jurors in the  
17 jury room?

18 Juror Four: No, sir.

19 Court: You haven't said anything to any of them about your scheduling issues?

20 Juror Four: No, sir.

21 Court: Haven't said anything to any of them about the book you're reading or what it's  
22 about?

22 Juror Four: No, sir . . . .

1 issues with the other jurors.<sup>7</sup> Jordan asserts his own belief that Juror Four was pressured or  
2 coerced into his effort to get off the jury, and he faults his counsel for not inquiring into this  
3 issue. Jordan's belief, however, rests on nothing more than an extended series of speculative  
4 inferences unsupported by the record. His argument amounts to nothing more than mere  
5 conjecture.

6 Jordan has also failed to show his counsel was ineffective regarding Juror Thirteen. On  
7 the second day of trial, Juror Thirteen recalled that one of her sons had been robbed while  
8 working at a bank. She indicated this event occurred about 14 years prior to this trial. She also  
9 recalled that her other son, while working as a bank teller, had caught a "washed check" about 10  
10 years prior to the trial.<sup>8</sup> She stated that she had not shared these recollections with the other  
11 jurors and the recalled memories would not affect her ability to serve as a fair and impartial  
12 juror. I determined there were no grounds to remove her for cause and I provided counsel an  
13 opportunity to make a record. Defense counsel indicated that his client objected, and restated,  
14 "just to be clear," that he objected to Juror Thirteen's presence "on behalf of [his] client."

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17 <sup>7</sup> Jordan speculates that, although Juror Four had indicated a bias favoring him, any  
18 expression of that bias to other jurors would have caused the other jurors to be biased against  
19 him.

19 <sup>8</sup> Contrary to Jordan's assertion, Juror Thirteen had disclosed that her sons worked at a  
20 bank.

20 Court: Have you, or a member of your family, or a close friend, ever worked in a bank or  
21 a financial institution?

21 ...

22 Juror Thirteen: My two sons worked in a bank putting themselves through college, for  
23 Bank of America.

1 Jordan's argument that his counsel was ineffective rests upon his conclusion that I should  
2 have dismissed Juror Thirteen for cause. He suggests that further questioning by his attorney,  
3 and a more strongly worded objection, would have achieved that result. But there was no basis  
4 to dismiss Juror Thirteen for cause. She unequivocally stated that her recalled memories would  
5 not affect her ability to be fair and impartial, and that she could set them aside. This record  
6 precludes finding either that counsel was ineffective or that Jordan was prejudiced by counsel's  
7 assistance rendered regarding Juror Thirteen.

8 Jordan asserts his counsel was ineffective for failing to advise him to take a plea deal.  
9 The assertion is contrary to the record, as supplemented by defense counsel's answers to  
10 interrogatories of the government. Defense counsel states that he conveyed to Jordan all plea  
11 offers made by the government. He further states that he advised Jordan "that it would be foolish  
12 to proceed to trial based on what was shown in the discovery. There was damning surveillance  
13 footage and the gunman pled guilty and had agreed to testify against Mr. Jordan." Accordingly,  
14 this ground for relief is without merit.

15 A closer question exists on Jordan's remaining argument that his counsel was ineffective  
16 for misadvising him about the elements of a § 924(c) offense. To convict a defendant of aiding  
17 and abetting a § 924(c) offense, the government must show either (a) the defendant facilitated the  
18 underlying violent felony and knew a firearm would be used, or (b) the defendant facilitated the  
19 use of the firearm.

20 Jordan contends his counsel did not advise him that he could be convicted under either  
21 theory, but instead incorrectly advised him that the government could convict him only on the  
22 theory that he "facilitated the use and carry of the firearm itself." He argues that he knew the  
23 government could not meet this burden because, as shown by the evidence at trial, he did not

1 facilitate the use or carrying of the firearm. Accordingly, he argues his counsel's incorrect  
2 advice caused him to not accept a plea offer made by the government and conveyed to Jordan by  
3 his counsel.

4 In support of his argument, Jordan points to a statement made by counsel during closing  
5 argument: "And, he can't be convicted unless he performed an act to facilitate or encourage the  
6 use of the gun, not the robbery itself, the use of the gun." Jordan argues this statement suggests  
7 counsel "may have labored under the misapprehension of the applicable law that Jordan claims  
8 his counsel foisted upon him."

9 If counsel's statement is read literally and without any context, it is an incomplete  
10 summary of the alternative elements by which the government can obtain a conviction for aiding  
11 and abetting a §924(c) offense. But the statement was made during defense counsel's closing  
12 argument. That is, he did not make the statement to demonstrate his knowledge regarding the  
13 government's burden of proof, or to convey to Jordan the elements of aiding and abetting a  
14 § 924(c) offense. Rather, counsel uttered that single sentence in an extended argument  
15 attempting to convince a jury to acquit Jordan under any theory presented by the government.  
16 Prior to that statement, counsel indicated the defense theory regarding the § 924(c) charges:  
17 "mere presence is a defense to just about every crime. Just because you're there and a crime is  
18 taking place doesn't mean you're guilty." Further, immediately following counsel's statement  
19 upon which Jordan relies, defense counsel argued:

20 He must aid and abet the underlying crime and knowing that a gun would be used  
21 or carried. Let me back it off. Merely aiding the underlying crime and knowing  
22 that a gun would be used cannot support a conviction. He must have directly  
23 facilitated or encouraged and not simply be aware.

1 In sum, the full context of counsel’s closing argument suggests that he correctly understood the  
2 government’s burden and the elements of the offense of aiding and abetting a § 924(c) violation.

3 But this does not resolve the question whether counsel effectively conveyed that  
4 knowledge to Jordan. Nor does the government’s effort to supplement the record with a  
5 statement from defense counsel resolve it. Rather than offering specifics, defense counsel  
6 summarily and generally states that he “fully and comprehensively advised Jordan about the  
7 elements of the crimes of which he was charged.” When viewed against the record, I cannot  
8 conclude that Jordan’s assertion that counsel misadvised him regarding the elements of aiding  
9 and abetting a § 924(c) offense are palpably incredible or patently frivolous. Therefore, I will  
10 hold an evidentiary hearing limited to Jordan’s ground for relief that his counsel did not correctly  
11 advise him regarding the elements of aiding and abetting a §924(c) offense, resulting in his  
12 decision to not accept a plea offer made by the government.

13 I THEREFORE ORDER that all grounds for relief in defendant Anthony Jordan’s 28  
14 U.S.C. § 2255 motion (**ECF No. 258**)—except as to his claim that his counsel was ineffective for  
15 misadvising him of the elements of aiding and abetting an 18 U.S.C. §924(c) offense—are  
16 **DENIED.**

17 I FURTHER ORDER that I will hold an evidentiary hearing solely on Jordan’s claim that  
18 his counsel was ineffective for misadvising him of the elements of aiding and abetting an 18  
19 U.S.C. § 924(c) offense. Due to the national emergency regarding the Covid-19 virus, the court  
20 is temporarily not scheduling hearings absent an emergency. Given that Jordan’s remaining  
21 claim will not impact his sentence for his other crimes, there is no emergency justifying an  
22 immediate hearing. I will schedule the evidentiary hearing after the court resumes normal  
23 operations. In the meantime, counsel should confer about how much time is needed to transport

1 Mr. Jordan to Las Vegas for the hearing, how many witnesses will be called at the hearing, how  
2 long the hearing will last, and how much time defense counsel needs with Mr. Jordan in person  
3 to prepare for the hearing. By April 10, 2020, the parties shall file a joint Notice specifying this  
4 information (and their disagreements, if any). I will use that information when scheduling the  
5 evidentiary hearing.

6 DATED this 17th day of March, , 2020.



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8 ANDREW P. GORDON  
UNITED STATES DISTRICT JUDGE